

2/ Portions of this decision have been redacted for security reasons, pursuant to 14 C.F.R. Part 191. All unredacted copies of this decision must be treated in a confidential manner. Unredacted copies of this decision may not be disseminated beyond the parties to this proceeding.

Regulations (FAR) (14 C.F.R. § 107.13(a)(1)).^{3/} However, in view of what he considered to be mitigating factors, the law judge reduced the \$1,000 civil penalty sought in the Complaint to \$500.

The incident giving rise to this case occurred during a two-week Civil Aviation Security National Airports Inspection Program (CASNAIP) inspection in * * * . One evening during that inspection, two unbadged FAA special agents were able to gain access to the airport's air operations area (AOA) by walking through a terminal building occupied by an airport tenant. The agents separately walked through the terminal building and then met on the AOA where they remained unchallenged for approximately 10 minutes before re-entering the terminal building. The agents had access to several parked aircraft while on the AOA.

An employee of the tenant, who was standing at a counter in the terminal building, observed the agents go through the building and onto the AOA, but did not challenge them. When the

^{3/} Section 107.13(a)(1) of the FAR provides in pertinent part:

(a) Except as provided in paragraph (b) of this section, each operator of an airport serving scheduled passenger operations where the certificate holder or foreign air carrier is required to conduct passenger screening under a program required by § 108.5(a)(1) or § 129.25(b)(1) of this chapter as appropriate shall use the procedures included, and the facilities and equipment described, in its approved security program, to perform the following control functions:

(1) Controlling access to each air operations area, including methods for preventing the entry of unauthorized persons and ground vehicles.

agents returned, they identified themselves to the employee and questioned her. She stated that she was unaware that she was expected to control access to the AOA, or that she had any security-related responsibilities.

Respondent's manager of airport operations testified that, as soon as he was informed about this incident, he called the tenant's general manager. The general manager told him that the employee had admitted her mistake, and that she claimed to be unfamiliar with the tenant's security responsibilities because she was scared and defensive. The general manager further reported that, contrary to what the employee told the special agents, she indeed had been instructed as to proper security procedures prior to the incident, and that those procedures also were reviewed with her after the incident. Respondent's manager of airport operations testified that, after this incident, proper security procedures were reinforced with all of the managers of the airport's tenants.

Respondent's approved security program provides that, "* * *
," and
that "* * *

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The law judge found that Respondent violated Section 107.13(a)(1) in that it did not use the procedures in its approved security program to control access to the AOA. Although the law judge found that Respondent had provided

adequate instruction and training with regard to the procedures in its security program, he concluded that the tenant and its employee had failed to implement those procedures in this case, and that Respondent was responsible for that failure. However, the law judge noted that Respondent had a "very positive attitude in implementing a workable, efficient security program," and that "they have made all necessary corrections that could be made in connection with the deficiencies found in the course of this inspection." The law judge concluded that the \$1,000 civil penalty sought in the Complaint -- the maximum fine possible for such a violation -- was inappropriate, and reduced the civil penalty to \$500.

On appeal, Respondent contends that it should not be held responsible for the security breach of its tenant's properly-instructed employee, because that constitutes an impermissible application of absolute liability.^{4/} Respondent further argues that the FAA's failure to consider corrective actions before assessing a civil penalty, and the FAA's failure to notify airport management personally that the CASNAIP inspection could result in civil penalties, should bar this action. Respondent also claims that the FAA has no meaningful standards for determining whether a discrepancy will be treated

^{4/} Section 107.13(a) does not impose absolute liability for unauthorized entry on the airport operator. In the Matter of [Airport Operator], FAA Order No. 91-18 (June 3, 1991), appeal docketed, No. 91-70464 (9th Cir. July 29, 1991), citing, 43 Fed. Reg. 60786, 60789 (1978).

as a violation, and that the law judge erred in refusing to address that issue.

Complainant argues in its appeal that the law judge did not provide a sufficient rationale for the reduction in sanction, and asks that the \$1,000 civil penalty be reinstated. For the reasons discussed below, both Respondent's and Complainant's appeals are denied, and the law judge's initial decision is affirmed in its entirety.

Contrary to Respondent's assertion, this is not a case of liability without fault. It is clear that the two special agents were able to enter the AOA unchallenged in this case because the employee of the tenant failed to challenge them. Respondent is responsible for that failure. The fact that Respondent properly instructed the tenant with regard to proper security procedures does not relieve Respondent of its responsibility for that breach. Unless otherwise formally agreed,^{5/} in the context of airport security, airport tenants and their employees must be treated as agents of the airport authority.

^{5/} An airport operator is relieved of its responsibility for security violations occurring in an air carrier's exclusive area if its approved security program contains an exclusive use agreement with an air carrier pursuant to 14 C.F.R. § 107.13(b). See also 49 U.S.C. App. § 1357(g), permitting approval of airport security programs which bind individual tenants to their own tenant security programs, and allowing airport operators to avoid liability for security violations when such a tenant is responsible. Neither of these situations is relevant to this case.

Respondent next argues that the FAA's failure to consider Respondent's corrective actions before initiating this enforcement action should bar this action and the imposition of any civil penalty in this case. The FAA investigative reports did not contain any description of the corrective action taken by Respondent after this inspection, and consequently, there is no evidence in the record that those corrective actions (i.e., reinforcing appropriate security procedures with the offending employee and with all tenant managers) were considered by Complainant in determining what sanction to seek in this case. It also apparently was not mentioned in FAA investigative reports that the special agents observed proper security measures in use during follow-up checks at the site of this incident.

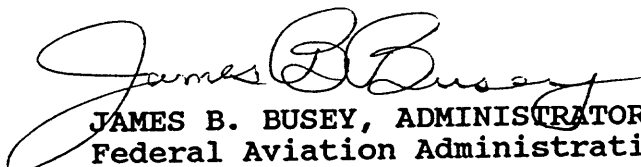
Nonetheless, the failure of these reports to document the corrective action taken by Respondent neither exonerates Respondent nor justifies the imposition of no civil penalty. As previously held, "[w]hile it may be appropriate in certain instances to consider corrective action in determining what, if any, civil penalty is appropriate for a discrepancy discovered during a CASNAIP inspection, it clearly does not follow that the performance of corrective action exonerates the violator in every case." In the Matter of [Airport Operator], FAA Order No. 91-18 at 7 (June 3, 1991), appeal docketed, No. 91-70464 (9th Cir. July 29, 1991). The corrective action taken by a respondent in some cases may warrant a reduction in an otherwise

appropriate civil penalty; however, this determination may be made by the law judge in the first instance, and may be reviewed by the Administrator de novo, on appeal.

Respondent's other arguments for reversing the law judge's finding of violation in this case are similarly unavailing. The Federal Aviation Act and its implementing regulations provided Respondent with adequate notice that a violation of the FAR could result in a civil penalty. In the Matter of [Airport Operator], FAA Order No. 91-18, at 9-10. No further notice to Respondent was required. Id. The law judge also was correct not to address Respondent's challenge to the FAA's exercise of its prosecutorial discretion. It is well-established that an agency's decision not to prosecute or enforce is a decision generally committed to the agency's absolute discretion, and should be presumed immune from review. Heckler v. Chaney, 470 U.S. 821, 831-32 (1984).

Turning now to the appropriate sanction, I believe that Respondent's corrective action alone does not warrant a reduction in sanction in this case because Respondent merely reminded tenants of their existing responsibilities. Nonetheless, I will defer to the law judge's assessment of Respondent's positive compliance disposition and, as a result, I will not disturb the law judge's modification of the civil penalty.

THEREFORE, for the reasons stated above, both Respondent's and Complainant's appeals are denied, and the law judge's initial decision is affirmed. A civil penalty of \$500 is hereby assessed.^{6/}


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 9th day of October, 1991.

^{6/} Unless Respondent files a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1991).